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CURRENT TOPICS.

Who has not been victimized, in a small way, by receiving in his change silver pieces which had had holes punched in them, which had been subsequently, for the purposes of better deception, filled with base metal of the general appearance of silver? Such a practice is, it seems, within the statute against uttering counterfeit coin. In a recent decision, in which he so held, Judge Lowell, of the United States Circuit Court for the Eastern District of Massachusetts, made an important distinction between two kinds of alteration. Said the opinion: "Silver coins of the denominations of quarter-dollars and half-dollars are required to be made of a certain weight and fineness, and are lawful tender in payment of debts to the amount of $10, and are to be received by the treasury in exchange for lawful money in sums of $20 or any multiple thereof. In the case of gold coins the law is that when reduced in weight below the standard they are good tender at proportional value. We find no such provision made for silver coins. If such a coin has had an appreciable amount of silver removed from it, we can not say that it remains a good coin for its original value, or even for proportionate value. If, then, the hole is plugged with base metal, or with any substance other than silver, this act is an act of counterfeiting, because it is making something appear to be a good coin for its apparent value, which was not so before. We are, therefore, of opinion that the ruling and conviction were proper in respect to those coins which had been drilled and afterward filled up. On the other hand, we do not consider it a criminal act, whatever the intention may have been, to add base metal to a good coin, and we see no ground for holding that a hole punched through a coin with a sharp instrument, crowding the silver into a slightly different shape, but leaving it all in the coin, has any effect to render it less valuable or less lawful tender than before. The statutes are silent upon this exact question, but we think it clear that a silver coin duly issued from the mint remains of full value so long as it retains all the appearance of a coin, and does, besides, contain all its original weight and fineness. This being so, we can not regard the addition of something to it as a criminal act of counterfeiting. Passing such a coin works no injury to the person to whom it is passed."

While the law is very far indeed of deserving the fulsome praise of being the "perfection of human reason," there are limits of absurdity and incongruity, beyond which even the strictest regard for technical symmetry in legal construction will not enable it to go. This was aptly illustrated in the recent case in Brown v. Burdett, in the English Chancery Division before Vice Chancellor Bacon. The testatrix in that case devised her house, orchard and garden, to trustees in trust, to brick up all the doors and windows (except the kitchen and a room for a caretaker), with all the furniture and other things, especially the clock, as she left them. The house was to remain in this condition for twenty years, after which it was to go to devisees beneficially. If the trustees failed to comply, the property was to fall to others. It was disputed in the probate court without success; but, when it came before the Chancery Division in an administration action, the bequest was pronounced a mere negation, and an intestacy was considered as created in respect of the twenty years. Pope's sarcasm that "thousands die and endow a college or a cat" was cited in extenuation of the bequest, but Vice-Chancellor Bacon was unable to see even a cat to be benefited. The beneficiaries, if any, were the spiders; or, perhaps, a fit legatee would have been the "dog in the manger." Said the English *Law Journal*: "It was impossible that a will of this kind should not to some extent endow the lawyers. * * * * The lady had probaby read of rooms locked up and kept for years just as they were left by the dead through the morbid fancy of a survivor. A place at the table duly laid at meals is another form of the same luxury of woe. The lady wanted her heirs to feel her power after her death, and wait with longing eyes on the blocked-up windows all the twenty years. The law has, in theory,

declined to gratify such a form of posthumous selfishness; but, in practice, the idea appears to have been carried out. The testatrix died in 1872, so that for ten years she has had her way, thanks to the law's delay, if not to the law."

In another column we reprint from 73 Mo. 427, a report of the case of Haney v. Alberry. We do this because of the apparent discrepancy which exists between that official version (where it will be seen the opinion was delivered by Judge Norton, and the judgment of the court below was reversed) and the report of the same case in 12 Cent. L. J. 39, in which Napton, J., delivered the opinion, and the judgment of the court below was affirmed. This discrepancy was called to our attention at the time of the issue of the official volume. An investigation of the cause, developed the fact that after the delivery of the opinion by Judge Napton (in which, by the way, all the judges concurred), a rehearing was had and the opinion was delivered by Judge Norton, which is the one that appears in the official report. The clerk, who furnishes the manuscript of the opinions filed, to the reporter, did not see fit to send a copy of the opinion of the court upon the first hearing, which was subsequently overruled, although the principles embodied in the two decisions are totally dissimilar, in consequence (as we are informed by one of the counsel in the case) of the fact that after the delivery of the first opinion and before the delivery of the second, material questions and some of the parties, were eliminated from the controversy by compromise. The dissimilarity in the doctrine of the two decisions will be apparent from an examination of the *syllabus* of each respectively. That of Judge Napton's opinion, printed in 12 Cent. L. J. 39, is as follows:

"A subsequent mortgagee having through his agent actual notice of a prior incumbrance, takes subject to the equities between the parties, without reference to the defective execution or improper recording of the instrument creating it."

The *syllabus* to Judge Norton's opinion, as appears in 73 Mo. 427, is as follows:

"The record of a deed acknowledged before a person named in the deed as party thereto, is not evidence against one who has no actual notice of the existence of the deed."

It is apparent that the question of the effect of the notice of a defectively recorded instrument, which was the gist of the first opinion, was not considered upon rehearing, and that, as to that point, the suppressed opinion is law, and should have been given to the profession with a sufficient statement of facts to make the matter clear. The impropriety of the exercise of any discretion on the part of the clerk as to what opinions he shall forward to the reporter is, we think, apparent, and also the fact that no such practice was contemplated by the statute. Revised Statutes, 1879, sec. 1080. The extent to which two opinions in a case modify and limit each other and the best method of presenting them to the public are, in our opinion, matters within the province of the reporter, who should, under the statute, be furnished with all the opinions filed, and be permitted to judge for himself the extent that an opinion on rehearing renders inoperative the opinion on the first hearing.

TELEGRAMS AND TELEGRAPH COMPANIES.

The importance which telegraph companies have assumed in late years, has given rise to many nice points of law relating to the subject; and their rights and duties have been extensively defined by judicial authority. When a telegraphic message is relied upon to establish a certain contract, it must be proved in the same manner as other writings are: either by the production of the original message, or by a copy of the same.[1] It appears to be generally admitted that the rules which apply to contracts made by correspondence through the mails, also regulate contracts entered into through telegraphs. The sending a telegram announcing consent to a proposition is a sufficient manifestation of consent to consummate and bind the contract. Perhaps, however, the truest and fairest interpretation of this principle is laid down in the case of Trevor v. Wood,[2] where it was said that the

[1] As to which is the original message, the one presented at the telegraph office for transmission, or the one received, see Saveland v. Green, 40 Wis. 440; Wharton's Evidence, 76 & 112; Trevor v. Wood, 36 N. Y. 307; Dunning v. Roberts, 35 Barb. 468; Redfield on Carriers, p. 400 and cases cited.

[2] 41 Barb. 255.

communication is initiated with the delivery of the proposal to the operator, and completed when it comes to the possession of the party for whom it is designed. The court, however, in that case, were of opinion that the rule as laid down by various authorities in reference to communications by mail was not applicable, that the action of the post office is governed by law, while the telegraph is controlled by private enterprise.

Telegraph companies are held liable for any neglect of duty whereby parties are misled or misinformed by the defective transmission of a message. In the case of the New York, etc., Printing Tel. Co. v. Druburg,[3] an order was sent by telegraph for two hand bouquets; the operator wrongly transmitted the order as calling for two hundred bouquets; the flowers were sent, the party giving the order refusing to accept them. He brought an action against the telegraph company for damage, and it was sustained. A telegraph company can limit and qualify their liability to any reasonable extent, but not so as to exempt them from damages for gross negligence.[4] Mr. Redfield, in his work upon Common Carriers, says in his chapter upon telegraph companies, that they may establish any reasonable rules and regulations limiting their responsibility to their own lines, and to repeated messages, subject only to the reasonable qualification that no such rules or regulations shall have the effect to screen the company from the consequences of their own default or misconduct." [5]

In order to limit their responsibility, the sender must have notice and the qualification must be reasonable. Nothing can protect them against a mistake or mishap occurring from their own neglect or oversight. Notwithstanding any special conditions which may be contained in a contract restricting their liability in case of an inaccurate transmission of a message, the company will still be liable for mistakes happening by their own fault, such as might happen on account of defective instruments or carelessness or unskillfulness of their operators; but not, however, for mistakes occasioned by uncontrollable cause; and in an action to recover damages resulting therefrom, the company, to exonerate themselves, must show how the mistake occurred. In the absence of any proof on their part, the jury must presume the want of ordinary care. [6]

A stipulation printed on the blanks furnished by the company to be used for sending all night dispatches over its line, by the terms of which such messages were sent at half price, on condition that the company should not be liable for "errors and delays in the transmission and delivery or non-delivery of such messages from whatever cause occurring, and should only be bound in such cases to return the amount paid by the sender," is unreasonable, and void as against public policy, so far as it undertakes to protect the telegraph company from liability on account of the negligence or fraud of its agents. [7]

It has, however, been decided in a number of cases, that a contract with a telegraph company, made in pursuance of a regulation in reference to messages sent "during the night at one-half the usual rates," containing a condition that the company shall not be liable for errors or delays in the transmission or delivery, or the non-delivery of such message, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender," was a reasonable regulation, and that such a condition was binding. [8] We are inclined to think that this is the correct rule. If the sender chooses to despatch his message at half rate, he assumes the additional risk. It is optional with him. The whole question, however, must be governed and controlled by the circumstances of the case itself. The regulation must always be a reasonable one. No limitation can extend to shelter the company from responsibility for losses due to the negligence of their servants; they can not, by arbitrary rules and regulations exempt themselves from liability where the mistake occurs through their own default or misfeasance.

In regard to their duty as to trans-

[3] 35 Pa. St. 298.

[4] McAndrews v. Electric Tel. Co., 33 Eng. L. & Eq. 180. If the notice be such as to entirely discharge the company from all liability, it conflicts with public policy; and if set up as a defense, is of no avail. Parks v. Alta Cal. Tel. Co., 13 Cal. 422.

[5] Redfield on Carriers, sec. 556.

[6] Tyler v. Western Union Tel. Co., 60 Ill. 421.

[7] Hubbard v. Western Union Tel. Co., 33 Wis. 550.

[8] Grinnel v. West. Union Tel. Co., 113 Mass. 299, and cases cited. [But see West. Union Tel. Co. v. Blanchard, 14 Cent. L. J. 331; also 14 Cent. L. J. 481.—Ed Cent. L. J.]

mitting messages going beyond the line of the first company, it depends upon the fact whether they have originally contracted to deliver the message at its ultimate destination, or merely to convey it as far as their own line runs. Unless they expressly limited their responsibility to their own route, and nothing was said at the time of the delivery of the message, or no notice was given to the effect that they would so limit their responsibility, it seems that they are obliged to transmit the message to its ultimate destination.[9] Where the several routes of telegraph companies are connected, if their arrangements are such as that one of them is authorized to receive a parcel or message for the entire route, and to take the pay for transmission beyond its own line, it may be held liable for any failure in the transmission throughout the connected lines as well as its own. Or a sender may recover from the company upon whose route the failure occurred, upon the principle that the carrier who first received the package, or message, acted as agent of the associates, in engaging for its transmission by their several lines.[10]

As to the rule of damages, the company must make good the loss resulting directly from its own default or neglect. The measure of damages is the natural and necessary consequences of the breach of contract, as contemplated by the parties interpreting the contract in the light of the circumstances under which, and the knowledge of the parties for which, it was made; and when a special purpose is intended by one party, and is not indicated by the message itself, such special purpose will not be taken into account in the assessment of damages for the breach of contract to send; the damages in such case will be limited to those resulting from the ordinary and obvious purposes of the contract.[11]

There is a case cited in Redfield on Carriers, where a merchant sent a message to this effect: "Stop sewing petal braid till I see you," and it was delivered "keep sewing," etc, and from the error a large quantity of braid was manufactured into unfashionable shape, it was decided that he could recover the whole loss sustained in consequence of the error.[12]

The case of De Rutte v. New York Tel. Co.,[13] discusses the subject in a thorough and satisfactory manner. Messages must be transmitted as promptly as possible. Inexcusable delay in the sending of a message where the sender is in any way injured is good ground for damages. For a discussion of this question, see the case of Davis v. Western Union Tel. Co.[14] We refer to one more case bearing upon this question. The plaintiff sent a message to the defendant's telegraph office in New York, directed to an attorney in Providence, Rhode Island, directing him to attach a house and lot in the latter city, of one B, who was temporarily absent from Rhode Island, for a debt of $12,000, due from B's firm to the plaintiff. The message was brought to the defendant's office at 8:30 P. M., the office being then closed for the transaction of ordinary business. The agent was told that the message was important; that unless it was sent and delivered at once it would be of no use; that the object of the message was to get an attachment upon property in Providence; that if it was not made before the Stonington train reached the Rhode Island State line, it would do no good. The defendant's clerk answered the plaintiff's messenger that the message would be sent and delivered as requested, and that he would not receive the money for it if he thought there was any doubt about it. The message was sent at 9:10 P. M., with directions from the operator in New York to send it in haste, and it was received by the operator in Providence at 9:30 P. M., who was then engaged in receiving reports from the press, which by statute have precedence over all other matters. The Providence operator answered that it could not be sent that night, as the delivery boy had gone home; to which the other answered that it must, and the former replied by a sign expressing his concurrence. The Providence operator was engaged without cessation in receiving newspaper reports

[9] Stevenson v. Montreal Tel. Co., 6 U pper Can. 530. See, also, Baldwin v. United States Tel. Co., 45 N. Y. 744; Redfield on Common Carriers (Telegraph Companies).

[10] Baldwin v. United States Tel. Co., 1 Lans. (N. Y.) 121; 54 Barb. 505; 6 Abb. (N. Y.) Pr. (N. S.) 405.

[11] Baldwin v. United States Tel. Co., 45 N. Y. 744, and cases cited.

[12] Redfield on Carriers, and cases cited (see Telegraph Companies).

[13] 1 Dr ly (C. P.). 547.

[14] 1 Cinc. (Ohio) 100.

until 11:30 P. M., when he had the message copied and sent to the attorney. When the attorney received it, it was too late to have the attachment made before the arrival of B, and the plaintiffs lost the advantage of securing their debt by an attachment. B's firm afterwards went into bankruptcy, and all that the plaintiffs recovered was $500. It was held that the plaintiffs were not bound to exhaust their legal remedy against their debtors by the recovery of a judgment, and the issuing of an execution before bringing an action against the telegraph company for their damages; that the measure of damages was the amount of the debt and the interest from the day of the delivery of the message, less the $500 received from the bankrupt estate of B's firm. The measure of damages should not be confined to the cost of sending the message and expenses incidental thereto.[15]

R. F. STEVENS, JR.

Pattison, N. J.

[15] Bryant v. American Tel. Co., 1 Daly (C. P.) 575.

CORROBORATIVE EVIDENCE.

There is practically only one case, that of a trial for treason, where the law of England requires more than one witness to prove the crime. But in a large number of cases, both criminal and civil, it is necessary that the evidence of a witness, a complainant, or a plaintiff, should be corroborated. The nature of the corroboration required is frequently mistaken, and an instance which came to our notice a few days ago showing the commonest variety of mistake has induced us to lay before our readers, at the risk of telling many of them what they already know, a short account of the cases in which corroboration is necessary, and the kind of evidence which amounts to corroboration.

One very important case in which the evidence of one witness must be corroborated is that of the hearing of a charge of perjury. The rule is thus stated by Stephen, J., in his "Digest of the Law of Evidence:" "If, upon a trial for perjury, the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted." Now it is to be observed that two witnesses are not necessary to disprove the fact sworn to by the defendant, "for if any material circumstances be proved by other witnesses in confirmation of the witness who gives the direct testimony of perjury, it may turn the scales and warrant a conviction."[1] As an example of what amounts to sufficient corroboration in perjury we may cite Reg. v. Shaw.[2] In that case it appeared that one S K had been summoned before justices for selling beer during prohibited hours. The defendant was called on his behalf at the hearing and swore that he was not in the house on that particular day, and that he had not been in the township on that day or for a fortnight before. At the trial, a policeman, to prove the perjury, swore that he had seen the prisoner in S K's house between three and five on the day in question, and to corroborate the policeman two other witnesses were called. One swore that he had seen the prisoner in the township at two o'clock on that day, another that she had seen the prisoner between three and four on the road leading to S K's beerhouse and close to the beerhouse. The court held that there was direct corroborative evidence of the one assignment of perjury that the prisoner had not been in the township on that particular day, and that there was also corroborative evidence of the assignment that the prisoner was in the house on that particular day from the fact that he was seen "near to and apparently in progress towards the door of the beerhouse." This case affords a good illustration of what corroboration ought to be. It is not necessary to prove the truth of every particular by additional evidence; it is sufficient to do so in one or more material points. And it is not necessary to do this by a witness. Thus in Reg. v. Mayhew,[3] it was held that to prove perjury, it is sufficient if the matter alleged to be falsely sworn be disproved by one witness, and in addition to the evidence of that witness there be proof of an account or a letter written by the defendant contradicting his statement on oath. A very remarkable case bearing on this subject is to

[1] 2 Russell on Crimes, 72.
[2] 34 L. J. M. C. 169.
[3] 6 C. & P. 315.

be found in a note to Reg. v. Harris.[4] A defendant was charged before Yates, J., with having committed perjury. He had first made his information on oath before a justice of the peace, that three women were concerned in a riot at his mill which was dismantled by a mob on account of the price of corn. Afterwards at the sessions when the rioters were indicted, he was examined concerning the same women, and having been tampered with in their favor, he then swore they were not in the riot. There was no evidence on the trial of the defendant for this perjury to prove that the women were in the riot (which was the perjury assigned), but the defendant's own original information on oath being produced and read, whereby he had sworn that they were in the riot, the judge thought it sufficient to convict him. This is an admirable illustration of the meaning of the phrase corroborative evidence. Here there was oath against oath, and that of the same person, but there was corroboration in that there was evidence that the defendant had been tampered with to swear falsely on one occasion. In a very similar case, Reg. v. Hook,[5] when the defendant had made contradictory statements on oath at different times, the statements of the defendant not made upon oath were held to amount to sufficient corroboration. This last case is worthy of careful perusal.

Closely connected with the principle of the above cases is the rule as to the evidence of accomplices. It is sometimes stated that the evidence of an accomplice is not alone sufficient to support a conviction, but that it must be corroborated. But such is not the case. A jury may lawfully convict on the testimony of an accomplice without corroboration. In Reg. v. Stubbs,[6] Jervis, C. J., said: "It is not a rule of law that accomplices must be confirmed in order to render a conviction valid, and it is the duty of the judge to tell the jury that they may act on the unconfirmed testimony of an accomplice; but it is usual in practice for the judge to advise the jury not to convict on such testimony alone; and juries generally attend to the judge's direction, and require confirmation. But it is only a rule of practice." The extent of the confirmation which should be looked for in such cases was thus stated by Hullock, B., in summing up to the jury in Reg. v. Barnard[7]: "It was not necessary that the accomplice should be corroborated on every material point; as then his evidence would be superfluous; but he must be confirmed in such and so many material points as to convince the jury that his statement was the truth." There is, however, an important limitation to this general statement. If there are two or three prisoners, the accomplice should be confirmed as to each prisoner, for "the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the second or third prisoner for himself in the narrative of the transaction.[8] In further illustration of this point, reference may be made to R v. Wilkes.[9] The prisoners were charged with stealing a lamb. One Gardner, an accomplice, proved the case against both prisoners, and stated that they threw the skin into a hole which he described. To confirm his evidence, a constable was called who proved that he had found the skin in the hole described. Upon this, Alderson, B., pointed out that though there was corroboration of the accomplice having been concerned in the transaction, there was none that the prisoners were. In summing up the learned judge said: "The confirmation of the accomplice as to the commission of the felony is really no confirmation at all; because it would be a confirmation as much if the accusation were against you or me, as it would be as to the prisoners. You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offense."[10] It may be gathered from these cases, that practically the rule as to corroboration applies to the evidence of an accomplice, viz., that he must be confirmed to an extent sufficient to justify the jury in believing in the truth of his statement, and that the jury ought to require some corroboration as to the person charged. It may be added be-

4 5 B. & Ald. 936.
5 8 Cox C. C. 5.
6 25 L. J. M. C. 16.
7 1 C. & P. 88.
8 Per Jervis, C. J., in Reg. v. Stubbs, *supra*.
9 7 C. & P. 272.
10 See, also, Reg. v. Farler, 8 C. & P. 107.

fore leaving this part of the subject, that two accomplices are held not to corroborate each other.[11] Nor does the evidence of the wife of an accomplice corroborate that of her husband.[12]

As all our readers know, there must be evidence in corroboration of the mother's statement in bastardy cases. By way of example under this head, we may refer to Reg. v. Percy.[13] There the corroborative evidence was the testimony of a witness who deposed to a conversation between himself and the defendant. He had told the defendant that the mother alleged him (the defendant) to be the father of the child, and he added "you must keep it." There defendant replied that he would not, that he would rather go to America. It was held that this was sufficient corroboration, being in fact an admission of the paternity of the child. Very similar to this case is Bessela v. Stern.[14] That was an action for breach of promise of marriage, another instance in which the law requires the statement of a party to be corroborated.[15] There the sister of the defendant swore that she had overheard a conversation between the plaintiff and the defendant, in which the former said, "you always promised to marry me and you don't keep your word." To this the defendant made no answer beyond offering the plaintiff money to go away. It was held that this was sufficient corroboration for the reasons thus stated by Bramwell, L. J., in his judgment: "The defendant made no answer. If we were to hold that that was no evidence of a promise, we should get rid of a great deal of evidence which is given every day at *nisi prius*. A claim is made on a man in respect of goods sold and delivered and he does not deny it. If a statement is such that a denial of it is not to be expected, then silence is no admission of its truth; but if two persons have a conversation, in which one of them make a statement to the disadvantage of the other, and the latter does not deny it, there is evidence of an admission that the statement is correct." Corroborative evidence may consist of proof of the acts or conduct of the defendant. Thus in Cole v. Manning,[16] evidence was given of acts of familiarity on the part of the alleged father towards the mother having occurred several months before the child could have been begotten, and that in consequence he had been forbidden the house by her parents. It was also proved that the woman was a person of weak intellect. No corroboration in relation to the actual begetting of the child was given. Field, J., said, "All such evidence must be entirely for the magistrate to consider the weight of. There is no rule of law that because the circumstances took place some months before, they are not to be considered in the light of corroboration. I am very clearly of opinion that they ought." In Reg. v. Berry,[17] Lord Campbell, C. J., in delivering the judgment of the court, said that the payment of money for the maintenance of the child was corroborative evidence of the paternity. But where proof of the payment of money by way of maintenance within the twelve months is required merely to give jurisdiction, the evidence of the mother as to such payments is sufficient without corroboration.[18] In that case, Bramwell, B., said: "The evidence of the mother must be corroborated in some material particular; that is, she must be corroborated to the satisfaction of the justices, but not as to the payment of money. No doubt under the 7 & 8 Vic., c. 101, s. 3, the justices must inquire into the fact of payment within the twelve months, to ascertain whether they have jurisdiction, but not further."

Under the Divided Parishes Act, 1876, s. 34, which enables a person to acquire a settlement by residence, it is provided that "an order of removal in respect of a settlement acquired under this section shall not be made on the evidence of the person to be removed, without such corroboration as the justices or court think sufficient." No decision has been given upon the part of the section, but the principles we have already illustrated ought to be amply sufficient to determine any question which may present itself for decision. There must be some evidence beyond the pauper's statement, but any evidence which is legally admissible, whether of witnesses, documents or the like, may be tendered in

11 Reg. v. Noakes, 5 C. & P. 326.
12 Taylor on Evidence, 814.
13 18 L. T. O. S. 238.
14 2 C. P. D. 265; 42 J. P. 197.
15 32 & 33 Vic., c. 68, s. 2.
16 46 L. J. M. C. 175.
17 28 L. J. M. C. 86.
18 Hodges v. Bennett, 29 L. J. M. C. 224.

corroboration; and such evidence must be upon some material point, such as would convince the court of the truth of the rest of the statement. But it is not necessary that the corroboration should go to every point, or even to every material point, if the court is satisfied with the corroboration already given. —*Justice of the Peace.*

CONTRACT — CONSIDERATION — NOTE GIVEN FOR FRAUDULENT CLAIM VOID.

ORMSBEE v. HOWE.

Supreme Court of Vermont.

A note given to settle a fraudulent claim, one wholly without foundation, and known by both parties to be such, under threats of suit, is without consideration and void, and can not be collected by a third party, though purchased before due, when such party was not only put on inquiry, but also acted in bad faith in buying, he being a general purchaser of the payee's notes and knowing his dishonest methods in obtaining them.

Heard by the court, September Term, 1880, Rutland County, Ross, J., presiding. Action, assumpsit on a note, with the common counts added; plea and replication. Both cases were substantially alike. The court rendered judgment for the plaintiff on the following facts: One Healey was the real owner of the note.

$95. SHARON, VT., Jan. 20, 1877.

On the first day of August next, for value received, I promise to pay O. Preston, or bearer, ninety-five dollars with use, payable at the Royalton Nat. Bank of Royalton, Vt.

P. O. Sharon, Vt. M. G. HOWE.

The execution and delivery of the note were admitted. On the back was indorsed "Pay A, W. Kenney, Cash. or order for collection for First National Bank, Danville, New York.

JN. FAULKNER, JR., Cashier."

The defendant claimed the indorsement restricted the negotiability of the note. The plaintiff was allowed to show, against the defendant's exception, by said Healey, that he deposited the note with the First National Bank, Danville, N. Y., for collection, and that the indorsement was made and note forwarded for that purpose and returned to him unpaid.

It appeared that O. Preston, the payee of the note, is the manufacturer of white wire cable clothes line, and that an agent by the name of Murray procured by fraud the defendant to sign an order January 1, 1877, though the order is dated January 1, 1876, the defendant understanding that he was only signing a contract to become the agent of said company to sell wire on commission. Said order was signed in duplicate and one kept by the defendant, who did not read the same.

On the day of the execution of the note, another agent of the company appeared and demanded payment for the wire, 2,000 feet of which with 100 feet extra was then in the depot at Sharon for the defendant.

The defendant denied his liability for the same, and claimed he had not signed the order which was produced; but on getting his duplicate found it corresponded with the one presented.

He still refused to pay, claiming he was defrauded into signing it. The agent threatened suit. The result was the defendant went with said agent to the depot and found the wire was there, and how much the freight was, and the same was deducted from the price of the wire and the note given.

The court found that the note was obtained by the production of said order, and threats that a suit would be brought upon it.

The wire is manufactured alone by said company by a patent process and patent machinery, and is a valuable article for a clothes line. The defendant has never taken said wire from the station, nor exercised any control over it; but the same remains there addressed to him, and so that he could take it if he chose; and he refused to pay the note when notified by the Bank of Royalton, and he had no funds there with which to pay the same. The said Healy purchased about $1,200 to $1,500 of such notes taken in the State of Vermont, and paid seven-eighths their face value in cash. He purchased the note in question before it became due. The company, consisting of O. Preston & Son, only agreed that the makers were pecuniarily responsible, and were to refund the money, or replace by other notes, if Healy should fail to collect any of said notes through the pecuniary irresponsibility of any maker. There was no other condition to said purchase. Healey knew O. Preston & Sons; knew they were manufacturing and selling said wire, and that they manufactured 15,000 to 20,000 feet per day, and that at that time were introducing the same by sales by agents. He had purchased $10,000 or $12,000 of such notes before, which were given in the State of New York, and had collected the same without suit with a single exception. The court did not find said discount greater than would ordinarily be made on notes so scattered, and where the makers resided so far from the payee.

The defendant was allowed to show against the plaintiff's exceptions by one H. C. Potter, that he had known said Healey since 1870; and that in November, 1875, he was at Hawesville, the place of the manufacture of said wire cable clothes line, and was shown over the works by O. Preston and said Healey, and was told by them that they were employing agents to obtain orders for said wire cable, and wanted to employ the witness to follow after such agents and settle for the orders as best he might, by taking notes or compromising; and that said Healey for this purpose offered said witness $100 per month, which he declined. The said Healey testified that he had no other interest

in said note than that he acquired by the purchase of the same, and the court so find.

The court, from the testimony of said Potter, find that said Healey had such knowledge in regard to the way in which the orders and notes for said wire were obtained, that he might reasonably expect that some of them were obtained in the manner these were.

J. J. Wilson, for the defendant, Howe, and *J. K. Batchelder*, for the defendant, Lane.

VEAZEY, J., delivered the opinion of the court:

The plaintiff, an attorney, brought these suits in his own name in behalf of one Healey, who purchased the notes before due of one Preston, the payee. Preston by fraud obtained orders of the defendants respectively for a lot of wire clothes line, and after filling the orders according to their terms, demanded through an agent payment of the defendants. They at first refused on account of the fraud, not knowing until the demand that they had signed such orders, and not, in fact, having signed them understandingly, and having been induced to sign them through fraud; but the orders being produced and suits threatened, they gave the notes in question. Where a claim is wholly without foundation, and known by the parties to be such, a promise to pay it is without consideration. There is in such a case nothing to be settled, therefore the settlement is no consideration for the promise. See authorities cited in defendant's brief. [Lloyd v. Lee, 1 Stra. 99 (case of forbearance); Palfrey v. Railroad Co., 4 Allen, 56; Kidder v. Blake, 45 N. H. 530; Sullivan v. Collins, 18 Iowa. 228; Knotts v. Ruble, 50 Ill. 226; Wilbur v. Crane, 13 Pick. 284; Crosby v. Wood, 6 N. Y. 369; Newell v. Fisher, 2 S. & M. (19 Miss.) 431; Long v. Towl, 42 Mo. 545; Farnham v. O'Brion, 22 Me. 475; Haynes v. Thom., 28 N. H. 386; Lang v. Johnson, 24 N. H. 302; Farrington v. Brown, 7 N. H. 271; Mullholland v. Bartlett, 74 Ill. 58; Foster v. Metts, 55 Miss. 77; 74 Ill. 58; 55 Miss. 77; 2 Wis. 5.]

This case discloses a scheme to get this wire clothes line on to people in a fraudulent way. It was first to get an order from a man by the use of all the fraud necessary for that purpose, and then by confronting him with the order, and by threats of suit get a settlement. The scheme, as originally concocted, extended through to the obtaining of the note. The order being obtained by fraud, no debt was created. There was nothing to found a settlement or compromise upon. Preston had no right to fill the order by forwarding the goods, and his doing so did not change or affect the transaction. This was a part of the scheme. The scheme was to bring about a disposition of his goods in the form of a sale by use of fraud. The iniquity of the conception is carried out in the execution without discovery by the other party until the demand for settlement. The fact that the defendant yields to the demand and threats, and promises to pay, or gives a note with knowledge of the fraud, can not help the promisee, because the note is but the fruit, the undergrowth of Preston's original fraudulent conception and act. His soiled hands have not thereby become clean. The compromise of a doubtful right is a sufficient consideration for a promise, and it does not matter on whose side the right ultimately turns out to be. But where the promise is extorted by threats to sue on a claim which the party knew was wholly unfounded, and which he was making for the purpose of extorting money, the contract is utterly void. McKinley v. Watkins, 13 Ill. 140, and the other cases cited by defendants.

We think the case discloses that Healey understood Preston's methods; that he knew that Preston deliberately proposed to practice fraud, if necessary, to get rid of his wares through the forms of sale, and that he became a general purchaser of his notes, knowing his fraudulent purpose and the likelihood that such purpose would often have to be carried out in order to get the notes. He was not only put upon inquiry, but we think upon the facts found that he bought the notes in bad faith. He was not an innocent purchaser under the rule as contended for by the plaintiff. Justice Swayne says in Murray v. Lardner, 2 Wall. 121: "The rule perhaps may be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike involve the result of bad faith." To buy notes generally that Healey knew would to some extent be likely to be infected with fraud, was not an honest act. He practically lent himself for a profit to Preston to enable him to carry out his fraudulent purpose.

The judgment of the county court in both cases is reversed, and judgment is rendered for the defendants respectively to recover their costs.

ATTORNEY AND CLIENT—AUTHORITY TO MAKE COMPROMISE.

TOWNSHIP OF NORTH WHITEHALL v. KELLER.

Supreme Court of Pennsylvania, March 27, 1882.

The putting of a claim into an attorney's hands for collection, without any further instructions, is authority to enforce it by legal process, and does not imply authority to compromise it by the acceptance in accord and satisfaction of a sum less than the amount due.

Error to the Court of Common Pleas of Lehigh County.

Edward Harvey, Esq., for plaintiff in error; *Harry G. Stiles* and *Evan Holben, Esqs.*, for defendant in error.

GORDON, J., delivered the opinion of the court:

The only question in this case is the one involving the power of an attorney at law to give an acquittance in full of his client's claim against a debtor, on receipt of part only for that claim.

We readily admit all that has been said as to the very general authority conferred upon attorneys at law in the conduct of suits, their power of reference, to confess judgments and control executions. But there is a limit to this power; it is created for specific, not general purposes. When a claim is put into the hands of an attorney for collection, without further instruction, it is generally understood to be for the purpose of having it enforced by legal process, and it is not presumed that the attorney either can or will, without process, compromise and settle it on such terms as either his judgment or caprice may dictate. We do not say that such power can never be exercised by the attorney without express warrant from his client, for an implied power may result from the character of the claim requiring collection, and the circumstances connected with it. So, if on the trial of a case the attorney should consent to a judgment less than the amount due, a court would not ordinarily, in relief of the client, set aside such judgment. But in such case in the conduct of a pending suit, the power of the attorney to direct and control it is undoubted. Nevertheless, even in the example put, when the act of the attorney has been obviously wrong, and where the rights of the client have been seriously compromised, the court, notwithstanding the judgment, ought to grant relief. Marshal, C. J., in Holker v. Parker, 7 Cranch, 452. Compromises by attorneys, in the absence of and without the assent of their clients, are not looked upon with favor, though, as was said in the case just cited, where the compromise is reasonable and fair, a court will not disturb it; still it remains, as was said by Mr. Justice Woodward, in Stokely v. Robinson, 10 Casey, 315, that "the principle is that the compromise, being an unauthorized act, is void," and this, though it may assume the form of an award. To a like effect are the cases of Huston v. Mitchell, 14 S. & R. 307, and Stackhouse v. O'Hara's Executors, 2 Harris, 88, in both of which cases the attorneys had agreed to take land in satisfaction of the debts of their clients. But it is useless to multiply authorities, for each case must be controlled, more or less, by its own peculiar circumstances, and it is not possible to express in a general rule that which will embrace all cases. It is enough for the present contention that courts have power to relieve clients from the unwarranted acts of their attorneys.

It can hardly be said that Keller was, by his attorneys, compromised out of the interest due him on his claim against the township of North Whitehall, for there was nothing on which to base a compromise. The confirmation of the award of damages was a final jungment, and bore interest, of course. The pending action is but part of an execution process to enforce payment, a result that might have been accomplished by *mandamus* from the Quarter Sessions. *In re* Sedgley Avenue, 36 Legal Intell. 106. There being, then, nothing to compromise, we need hardly say that the attorney had no power, of his own motion, to remit part of his client's judgment without pretense of equivalent. An attorney can not thus give away his client's property. More than this, the defendant is utterly without equity. The supervisors knew that Mr. Stiles was acting without his client, and, with hesitation, saying to them that he did not understand the matter, and that Keller ought to be present to sign the receipt. Furthermore, a day or two after the payment, Stiles having ascertained that his client refused to ratify what he had done, made a retender of the money, which the counsel for the defendant and its officers refused to accept. There was thus an effort made by the plaintiff's attorney to restore the defendant to the same position which it occupied when payment was made, and that this effort was not successful, resulted from no default of the plaintiff, but from the refusal of the agents of the defendant to accept the offer thus made to them.

We are thus brought to the conclusion that, in the rulings of the court below, there has been no departure from the principles of either law or equity.

The judgment is affirmed.

CONVEYANCES — ACKNOWLEDGMENT OF DEED BEFORE PARTY—NOTICE.

HAINEY v. ALBERRY,

Supreme Court of Missouri, April Term, 1882.

[73 Mo. 427.]

The record of a deed acknowledged before a person named in the deed as party thereto, is not evidence against one who has no actual notice of the existence of the deed.

Appeal from Cass Circuit Court. Hon. F. P. Wright, Judge.

Tomlinson & Ross and *R. O. Boggess*, for appellant; *W. J. Terrell*, for respondent.

NORTON, J., delivered the opinion of the court:

On the trial of this cause, plaintiff offered to read in evidence a certified copy of the record of a deed dated October 25, 1872, executed by the defendant, Alberry and wife, parties of the first part, to N. I. Thompson, party of the second part, and W. W. Cockins, party of the third part. This was objected to on the ground that the said deed was acknowledged before and certified to by N. I. Thompson, who was a party thereto. This objection was overruled, and the evidence offered was received, and it is chiefly this action of the court which is relied upon as error. Under the authority of the following cases: Dail v. Moore, 51 Mo. 589; Black v. Gregg, 58 Mo. 565: Stevens v. Hampton, 46 Mo. 404; Ryan v. Carr, 46 Mo. 483; 1 Wag. Stat. 277, secs. 24, 25, the court erred in admitting said evidence, there being no evidence in the record tending to show that the defendant,

or those under whom he claimed, had actual notice of the said deed of October 25, 1872. Judgment reversed and cause remanded, in which all concur.

NOTE.—Compare Haney v. Alberry, 12 Cent. L. J. 39.—[ED.

RAILROAD — NEGLIGENCE — INFANT OF TENDER YEARS.

FRICK v. ST. LOUIS, ETC. R. CO.

Supreme Court Missouri.

1. In passing upon a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence which a jury might, with any degree of propriety, have inferred in his favor; and if, when viewed in this light, it is sufficient to support a verdict in his favor, the demurrer should be sustained. But the court is not at liberty, in passing on such demurrer, to make inferences of fact in favor of the defendant to countervail or overthrow, either presumptions of law or inferences of fact, in favor of the plaintiff. Buesching v. St. Louis Gas-light Co., 73 Mo. 231, 12 Cent. L. J. 273; followed and approved.

2. At street crossings in a town or city where the public have a right to be, and where people are constantly passing and repassing, railroads should exercise a high degree of vigilance; the signals required by law for the protection of travelers upon the highway should be given, and the servants of the company in charge of the train should be at their posts observant of the track and ready at a moment's notice to avert, if possible, any apprehended danger.

3. The plaintiff, an infant of tender years, was run over and injured by a gravel train of the defendant, midway between Grand avenue and Theresa street, in the City of St. Louis. The evidence was conflicting as to the length of time she was on the track before the injury, but the track was level, the view between the streets was unobstructed; the road was unfenced, there were dwellings on either side; there was a pathway leading across the track, and the train was approaching a crossing. *Held*, that if the servants of the defendants saw, or, by the exercise of ordinary care, under the circumstances stated, could have seen the plaintiff in time to have avoided injuring her, and failed to do so, the defendant is liable, and whether the servants of the defendant were, about the time of the injury, using such care was a question of fact for the jury.

4. An instruction asked in such case by the defendant, which exempted the defendant from liability, unless the train could have been stopped in time to have prevented the accident after the dangerous situation of plaintiff was discovered, was properly refused, because not containing the qualifications, "or by the exercise of ordinary care would have been discovered."

5. Where what constitutes a proper rate of speed depends upon the length and character of the train, the location and particular surroundings of the track and other circumstances, and no law or ordinance regulating the speed of trains and applicable to the case is in evidence, whether the rate of speed is improper or dangerous is a question of fact for the jury.

Appeal from the St. Louis Court of Appeals.

HOUGH, J., delivere dthe opinion of the court:

This was an action in the name of Lulu Frick, a minor, by her next friend, to recover damages for personal injuries sustained by her by reason of having been run over by a gravel train of defendant, midway between Grand avenue and Theresa street, in the City of St. Louis.

The train which inflicted the injury consisted of flat cars, seven of which were empty and three loaded with stone, propelled by an engine in the rear thereof, to which was attached a tender and a caboose.

The negligence of the defendant which, it is alleged, occasioned the injury, is thus stated in the petition: That immediately before said accident occurred, and while said train was moving toward the said Lulu, the servants and employees of defendant in charge of said train, were duly warned of the approaching danger to said child by one Mrs. Hahn, who ran rapidly toward said train, and who, by loud cries and violent gestures, besought said servants and employees to stop said train of cars; but the said servants and employees carelessly, negligently and recklessly disregarded said warning, although they had ample time and means to stop said train in season to avert said accident. That the said injuries to the said Lulu Frick, resulting in the loss of her arm and leg, was caused by the carelessness and negligence of defendant, its servants and employees, in neglecting and failing to fence the said road, or place watchmen along the same, whereby the said Lulu Frick was permitted to wander upon said track, and the negligent and reckless disregard of the warning aforesaid, and in failing and neglecting to observe or notice the said Lulu Frick upon said track, or provide any watchmen upon the rear end of said train, to see that said track was clear, and in causing said train to be moved then and there at a dangerous speed. That said Lulu Frick was in full view of said train of cars for a considerable length of time before said train of cars reached her. That, by the exercise of ordinary prudence, care or watchfulness upon the part of the employees in charge of said train, the said Lulu would have been observed, the train stopped, and the accident averted.

The plaintiff was a little more than two years of age when injured, and was quite active. She resided with her parents, about two hundred feet north of defendant's track. Mrs. Maggie Hahn, who resided in the house next to that of plaintiff's parents, testified that a short time previous to the accident, which occurred between nine and ten o'clock in the morning, she left her house with her little boy to look for her cow. That she went straight south to the railroad track, leaving a path which runs from the vicinity of plaintiff's house across the railroad, a little to her right. She then walked west along the railroad to Grand avenue, a distance of about three hundred feet, and not finding her cow there she sent her son to the next

crossing, the distance to which is not stated, and when he returned he said to her, "A train is coming, get off the track." She immediately turned, saw the train in question, and also saw Lulu Frick, the plaintiff, standing in the middle of the track, five or six feet west of where the path crosses the track. The cars were then about one hundred and fifty or one hundred and sixty feet from the child, and were running about as fast as witness could run. She at once ran towards the child, waving her hands to attract the attention of the men on the train, calling to them to stop, that there was a child on the track, and calling also to the child to get off the track. The child attempted to get off, but was run over by several cars, which mangled one leg and arm, which were afterwards amputated. The track was level and almost straight, and the witness said the child could have been seen a great distance. There was a brakeman on the front car, and several other persons between that car and the engine. A locomotive engineer and machinist testified that the train could have been stopped in seventy feet after the engineer received the signal, if running at four miles an hour. How the plaintiff got upon the track does not appear. The witness supposed that she followed Mrs. Hahn. The defendant demurred to this evidence. The demurrer was overruled, and the action of the court is alleged as error.

In the case of Buesching v. St. Louis Gaslight Company, 73 Mo. 219-231, [12 Cent. L. J. 273] this court said: "In passing upon a demurrer to the evidence, this court is required to make every inference of fact in favor of the party offering the evidence which the jury might, with any degree of propriety, have inferred in his favor; and if, when viewed in this light, it is insufficient to support a verdict in his favor, the demurrer should be sustained. Wilson v. Board of Education, 63 Mo. 137. But the court is not at liberty, in passing on such demurrer, to make inferences of fact in favor of the defendant to countervail or overthrow either presumptions of law or inferences of fact in favor of the plaintiff; that would clearly be usurping the province of the jury."

As the train in question was moving through the suburbs of a city, between two streets, about seven hundred feet apart, along an unfenced track, with several dwellings on either side thereof; and as the view of the track in front of the train was unobstructed, and as the law requires the bell to be rung when the train approaches within four hundred and forty feet of a public crossing, and kept ringing until it crosses the same; and as the train, at the time Mrs. Hahn first saw it was within a few feet of the place where it was the duty of the train men to commence ringing the bell, and to observe whether any persons were approaching the crossing; and as Mrs. Hahn was on the track at the crossing, waving her hands and hallooing, and as the child was standing in the center of the track, in a direct line between the train and Mrs. Hahn, and one hundred and fifty or one hundred and sixty feet from the train, and the train could have been stopped within ninety-five feet, the jury might fairly infer that the men in charge of the train saw, or by the exercise of ordinary care could have seen the child in time to have stopped the train before it ran over the child. Besides, it appears that the child was near a path which crossed the railroad track, and although no person had a right to go upon or across the defendant's track at that place without the consent of the company, yet the presence of that path was itself a warning to the servants of the company that persons were in the habit of trespassing upon the track at that point, and that at least as long as the track remained unfenced, they might reasonably apprehend a continuance of such trespassing. It is true the law does not require fences to be erected at such places, but the company may lawfully erect them if it so desires. Edwards v. Railroad, 66 Mo. 567. We are of the opinion, therefore, that the demurrer to the evidence was properly overruled.

The defendant then introduced testimony showing that there were only four servants of the company in charge of the train, the engineer, fireman, brakeman and conductor. Two boys having no connection with the train were on the second or third car from the west end. The conductor was in the caboose at the time the alarm was given; the engineer and fireman were on the engine, and the brakeman was on the front car. The defendant's evidence tended to show that after a signal given to stop the train, it could not be stopped at a distance less than its length, which was about three hundred and sixty feet. Some of the testimony on this point was that it could be stopped within two hundred to five hundred feet, depending upon the exact rate of speed, the amount of steam, the dryness of the rails and the position of all the employees at the moment of the warning. It was admitted the train was running on a level track at the time the plaintiff was injured, and it was admitted by the plaintiff that the engineer of the train did all in his power after receiving the signal from the brakeman. Neither the engineer nor the brakeman saw the child before it was run over. The fireman, who was on the left side of the engine ringing the bell, testified that he did not see the child to know what it was, until about the time the train struck it. The brakeman, who was on the front car and nearest the child, testified as follows: I was on the west end of the car and at my brake, and when I saw the child on the track I gave the engineer signals to stop. I gave the signal with hand and arm (indicating a downward motion). I saw the child upon the track when the train was about a car and a half or two car-lengths from it. The cars are thirty feet long, and that would make it forty-five or sixty feet. I saw a woman up at Grand avenue. I did not understand anything she said. I saw the child first, but I saw them both about the same time. I did not understand

the meaning of the words or gestures made by the woman. I did not pay much attention to her. When I discovered the child I gave a downward signal, either with one hand or both; either would be proper. The signal means to stop; I also set my brake. When I gave the signal the engineer called for brakes. He gave one short sound of the whistle. I also felt the slack taken up from the other end of the train, which would indicate that he was trying to stop, and that he had reversed the engine. I heard the whistle before I felt the slack taken up. It was not over half or a quarter of a minute after I heard the whistle before I felt the slack taken up; it was right quick after it. After I gave the signal with my hands, the engineer called for brakes right away. He did it immediately. After I set the brake on the first car, I ran back and set the brake on the next car behind me. I have been four years railroading, and worked a year and a half on a construction train. From my experience in railroading and in handling and moving a construction train such as that was, I knew it was not possible to stop that train after the child was discovered befor it was run over. After I had set the brake on the front car, and gone back and set the brake on the next car, there was nothing else that I could do to stop the train before the child was run over. *Cross-examined.* I am still in the employ of the defendant. I first saw the child near the corner of the fence. It was just climbing up on to the rail. It just had one foot or one leg over the rail. She was not standing in the middle of the track. She did not get in the middle of the track at all that I saw. When I first saw her, she was just climbing up over the rail. The first thing I did was to give the signal to stop, and then I set my brake. I did not look at the child all the time. I attended to my business. I do not know how far we were from Grand avenue. I think we were near the middle of that block. I may have been a little excited. I could see up the track to Grand avenue, and could have seen Mrs. Hahn while I was putting on my brake. I saw the child before I saw the woman. I saw the woman while I was putting on my brake, but I did not see her until after I had seen the child. My face was in that direction when I was setting up the brake. I was not watching the woman, but I could see what she was doing. The child was run over opposite the corner of that fence, about the middle of the block. I do not know that the child was standing in the middle of the track before I saw it. I don't think the child was in the middle of the track at all. I have sworn that when I first saw the childit was climbing over the rail. I think now that she was just getting on to the track. She was not in the middle of the track. I think we were moving at the time about five miles an hour. As near as I can judge, we were running five miles an hour. In my direct examination I said we were running from four to six miles an hour.

The foregoing is all of the brakeman's testimony that is material to the case. At the instance of the plaintiff the following instructions were given: 1st. The jurors are instructed that it is no evidence of negligence on the part of the defendant that it had not fenced its road at the locality where the alleged injury occurred. But if the jury find from the evidence that defendant, its agents or employees, notwithstanding said road was not required to be fenced, could, by the exercise of ordinary prudence and care, have avoided or prevented the injury to plaintiff, then they should find for plaintiff. 2d. The jury are instructed that railroad companies, owing to the dangerous character of the machinery and vehicles they operate, will be held to the greatest caution and skill in the management of their business, but the extraordinary degree of care and skill on their part will not exonerate others who have been wanting in prudence or guilty of negligence; and hence, as a general rule, a railroad company can not be held liable for negligence or want of caution or skill in a case wherein it is shown that the party seeking to recover has himself been guilty of negligence or want of care or prudence, directly contributing to the injury complained of.

The rule above stated, however, does not apply when the party plaintiff is an idiot, insane person or an infant of such tender years as to be incapable of taking care of himself or herself, or incapable of apprehending danger, or of the exercise of prudence or foresight in avoiding danger.

In this case the child, Lulu Frick, was incapable of contributory negligence. and the only question for the jury to consider, in determining the liability of the defendant, is as to whether the accident complained of was the result of negligence, or want of care or skill, on the part of the defendant's agents or employees.

3d. If the jury find for the plaintiff,they should, in estimating the amount of damage, take into consideration the age and situation of the plaintiff, her bodily sufferings and mental anguish resulting from the injury received, and the loss sustained by reason of such injuries, and the extent to which she will be thereby disabled from ever earning her own living.

At the request of the defendant, the court gave the following instructions: 2d. The court instructs the jury that the defendant was not required to have a fence along the sides of its track at the place where said child was injured; and that if the jury find from the evidence that the plaintiff got upon the track and was injured in direct consequence of there being no fence along the sides of said railroad at said place, then plaintiff can not recover in this action. 4th. The court instructs the jury that it was not negligence on the part of the defendant's servants to disregard the cries and warnings of Mrs. Hahn before they understood and knew the meaning of such cries and warnings; and if the jury find from the evidence that the plaintiff was injured in direct conse-

quence of a failure on the part of defendant's servants to obey such signals before they knew or understood the purpose for which they were made, then the finding must be for the defendant. 5th. If the jury believe from the evidence that the persons in charge of the train were exercising ordinary care in running, conducting and managing the same, and that they did not discover the child upon the track, or see her approaching the same in time to prevent the injury complained of, then the plaintiff can not recover on the ground of negligence on the part of those who were in charge of said train. 7th. If, from all the facts and circumstances in evidence in this case, you believe that the injury to the said Lulu Freck was the result of accident or misadventure, without negligence on the part of those in charge of the train, then the finding must be for the defendant. 8th. The court instructs the jury that there is no evidence in this case tending to show that the plaintiff was recklessly or wantonly injured by those in charge of defendant's train.

The court of its own motion gave the following: 1st. If the jury believe from the evidence that the injuries mentioned in this petition were inflicted upon the plaintiff by the defendant, or its agents or employees, and that by the exercise of ordinary care, skill or prudence on the part of such agents or employees, the accident would not have occurred, then the jury will find for the plaintiff. 2d. If the jury believe from the evidence that the defendant, through the negligence or carelessness of its agents or employees, inflicted the injuries mentioned in the petition, they will find for the plaintiff, and assess her damages at such sum as they may believe she is entitled to, not exceeding the amount claimed in the petition. 3d. The court instructs the jury that defendant was not required to employ watchmen, except at public crossings, to prevent children or other persons from getting upon its track, and its failure to employ watchmen for this purpose was not negligence. And if the jury should find from the evidence that plaintiff was injured in direct consequence of defendant's failure to employ such watchman, the plaintiff can not recover, and the finding must be for defendant.

The only instructions asked by the defendant and refused by the court, which it will be necessary to notice are the following:

2d. Although the jury may believe from the evidence that the plaintiff was run over and injured by a train of the defendant's cars, yet that fact does not authorize the jury to find a verdict for the plaintiff in this action, and unless it has been proved to the satisfaction of the jury, that after she got upon the track, or her dangerous situation was discovered, the train could have been stopped in time to have prevented the cars from running over her, then the finding must be for the defendant.

4th. The court instructs the jury that there is no evidence in this case tending to show that the train in question was being run at a dangerous or unlawful rate of speed at the time the plaintiff was injured.

There was a verdict and judgment for the plaintiff for $10.000. This judgment was formally affirmed by the court of appeals, and the defendant has appealed to this court.

The plaintiff in this case being an infant of tender years, to whom no contributory negligence can be imputed, the only point remaining to be determined is whether the question as to the defendant's negligence was properly submitted to the jury. No suggestion has been made that there was any negligence on the part of the parents of the plaintiff, which would preclude a recovery by her; nor does this record warrant any such suggestion. Koons v. Iron Mountain R. Co., 65 Mo. 592; Stillson v. Hannibal, etc. R. Co., 67 Mo. 571; Cooley on Torts, 682; Kay v. Pennsylvania R. Co., 65 Pa. St. 269. The defendant contends that the first and second instructions given at the request of the plaintiff, and the first and second instructions given by the court of its own motion, are erroneous in that they fail to tell the jury that the defendant was liable only in case its servants failed to exercise ordinary care to prevent the injury after they became aware of the danger to which the plaintiff was exposed. This would undoubtedly be a proper qualification of the instructions referred to, if this were the case of an adult who had been guilty of contributory negligence; but such a qualification would be manifestly improper in this case, unless the servants of the defendant were under no obligation whatever to observe the track between Grand avenue and Theresa street, in order to avoid injuring such persons as might be upon the track between said streets, even without the permission of the company.

It has been repeatedly held by this court that greater care is to be exercised by the persons managing a train of cars within the limits of a town or city than is required in the country. Brown v. Railroad, 50 Mo. 461; Maher v. Railroad, 64 Mo. 276; Hicks v. Railroad, 64 Mo. 439; Harlan v. Railroad, 65 Mo. 25.

In Brown v. Railroad, *supra*, it was said that in towns caution should always be used, and the degree of care to be exercised must, of course, be proportioned to the danger to be apprehended of inflicting injury on others. At street crossings in a town or city, where the public have a right to be, and where people are constantly passing and repassing, a high degree of vigilance should be exercised. The signals required by law for the protection of travelers upon the highway, should be given, and the servants of the company in charge of the train should be at their posts, observant of the track and ready at a moment's notice to avert, if possible, any apprehended danger. Kelly v. Hannibal, etc. R. Co., (decided March 6, 1862). The rule laid down in Brand v. S. & T. R. Co., 8 Barb. 368, cited by defendant's counsel, which was a case of injury in a street, was disapproved in the case of Johnson v. Railroad, 6 Duer.

633, and also by the Court of Appeals in the same case, 20 N. Y. 65. A less degree of vigilance will ordinarily be required between the streets of a town or city, than will be required at a street crossing, or when running longitudinally on a street; but, undoubtedly, some vigilance is required, even between the streets, and the degree required will necessarily vary with the attendant circumstances. In any case, the requisite degree of vigilance may be properly designated by the words "ordinary care," that is, such care as would ordinarily be used by prudent persons performing a like service under similar circumstances.

In the case before us the testimony is conflicting as to the length of time the plaintiff was on the track before she was run over, but the track was level, the view between the streets was unobstructed, the road was unfenced, there were dwellings on either side, there was a pathway leading across the track, and the train was approaching a crossing, and we are of the opinion that if the servants of the defendant saw, or by the exercise of ordinary care, under the circumstances stated, could have seen the plaintiff in time to have avoided injuring her, and failed to do so, the defendant is liable; and whether the servants of the defendant were, about the time of the injury, using such care was a question of fact for the jury; and the fifth instruction, given at the request of the counsel for the defendant, shows that they so regarded it. P———, etc, R. Co. v. Hummell, 44 Pa. St. 372. The fact that the road was not fenced does not give a right of action any more than any one of the other facts mentioned would give a right of action, and it is clear that no one of them would; but it is the duty of vigilance imposed by all of these circumstances combined, and the absence of such vigilance resulting in injury which gives a right of action. The rule here laid down is not in conflict with the general doctrine that a railroad company is entitled to a clear track. Where there is reason to apprehend that the track may not be clear, notwithstanding the right of the company to have it clear, persons operating a train can not act upon the presumption that the track is clear without being responsible for the consequences.

Counsel for the defendant also object to the second instruction given for the plaintiff, for the reason that in the first paragraph thereof it is declared to be the duty of railroad companies to exercise the greatest caution and skill in the management of their business. This degree of care and skill, it is asserted, can only be exacted where the relation of passenger and carrier exists, and can not be required of the defendant under the circumstances of the case. Conceding that the standard of care set up in this paragraph is inapplicable to the case at bar, still we do not conceive that it furnishes a sufficient reason for reversing the judgment in this case. The language employed is not applied to the defendant in this case. It is a mere general declaration of an abstract truth applicable alike to all railroads, which might very properly have been omitted, under the view which we have taken of this case, but which does not in our opinion materially affect the merits of this controversy. A similar declaration, though criticised was tolerated by this court, in the case of Brown v. Railroad, 50 Mo. 467, under circumstances where, we think, it was calculated to do greatly more harm than in the case at bar.

In the case of Harlan v. Railroad, 65 Mo. 22, although the injury there complained of did not occur at a public crossing, it was said that it did occur in a crowded city "where the public had a right to expect extraordinary care to prevent accidents." And in the case of Stilson v. Railroad, 67 Mo. 671, although the injury there complained of did not occur at a street crossing, but "on a part of the track where there was not even a private or occasional pathway, and where consequently the defendant had a right to presume that no one would attempt to cross," this court said: "The obligations, rights and duties of railroad companies and travelers crossing them are mutual and reciprocal, and no greater degree of care is required of the one than of the other. Harlan v. Railroad, 65 Mo. 22; Cont. Imp. Co. v. Stead, 95 U. S. 165. Whilst the highest degree of care should be exacted from those who operate such dangerous machinery, a corresponding obligation is imposed on the public, outside of the passengers on the train, to observe the like caution. Harlan v. Railroad, 65 Mo. 22." And in Bell v. Railroad, 72 Mo. 50, which was a suit for injuries inflicted in a town, but not at a crossing, an instruction embodying the declaration contained in the paragraph now under consideration received the tacit approval of this court.

Inasmuch as the question now directly presented for adjudication was not specially brought to the attention of the court in the cases cited, and can not therefore be esteemed to be the point in judgment in those cases, we do not feel that we are departing from what can be regarded as the settled law of this court in announcing the rule contained in this opinion, and we are of the opinion that the defendant in this case had the full benefit of that rule. The last paragraph or subdivision of the plaintiff's second instruction is the only part thereof which is in terms declared to be applicable to the facts in evidence, and that is in entire harmony with the first instruction given for the plaintiff, the fifth instruction given for the defendant, and the first instruction given by the court of its own motion, in each of which the jury were distinctly told that the defendant was liable only for want of ordinary care. Under these circumstances we think the conjecture that the jury could have been misled by the first paragraph of this instruction is not at all probable.

The second instruction asked by the defendant was properly refused, for the reason that it exempts the defendant from liability, unless the train could have been stopped in time to have prevented the accident after the dangerous situa-

tion of the plaintiff was discovered. This instruction should have been qualified by adding after the word "discovered," the words, "or by the exercise of ordinary care would have been discovered." Baltimore, etc. R. Co. v. Trainer, 33 Md. 542.

The fourth instruction asked by the defendant was properly refused by the court. In cases like the present, where what constitutes a proper rate of speed depends upon the length and character of the train, the location and particular surroundings of the track and other circumstances, and no law or ordinance regulating the speed of trains and applicable to the case is in evidence. Whether the rate of speed is improper or dangerous is a question of fact for the jury. Bell v. Railroad, 72 Mo. 54-61.

We have carefully examined the cases cited by the defendant, but do not deem it necessary to review them. Most of them are unlike the case at bar in its most essential features, and are therefore inapplicable. The case of Singleton v. E. C. R. Co., 7 C. B. (N. S.) 289, though cited by this court in Isabel v. Railroad, 60 Mo. 475, was not approved, and is contrary to the weight of American authority. *Vide* Shear. & Redf. on Negligence, sec. 493, note 4. In that case, the driver saw the dangerous position of the plaintiff, a child three and a half years old, and made no attempt to stop the engine, contenting himself with merely turning on his whistle. The child's leg was cut off, and it was held that the company was not liable. The case of Meeks v. Railroad, 52 Cal. 502, imputes negligence as a matter of law to an infant six years of age.

Discovering no error in this record materially affecting the merits of the action, the judgment of the court of appeals will be affirmed.

Motion for rehearing overruled.

SHERWOOD, C. J., dissenting.

WEEKLY DIGEST OF RECENT CASES.

1. ADMIRALTY—WARRANTY OF SEAWORTHINESS IN CHARTER-PARTY—CONSTRUCTION.

Parties engaged in transporting fresh beef from Texas to the North by a refrigerating process, charter a steamer, but without specifying in the charter the purpose for which she was to be used; her boiler leaking, it took a long time to make the voyage, and the beef spoiled; *Held*, that the warranty of seaworthiness in the charter meant only that she was capable of making the voyage, and not that she was bound to make it in any particular time, nor that she was suitable for carrying fresh beef. *Duncan v. Steamer Francis Wright*, U. S. S. C., April 17, 1882, 4 Morr. Trans., 487.

2. APPEAL—FINAL JUDGMENT—RECORD MUST SHOW WHAT.

A record of a case simply showing a verdict and motion for new trial overruld, but no judgment on the verdict, shows no such final judgment as is reviewable. *National Life Ins Co. v. Scheffer*, U. S. S. C., April 24, 1882, 4 Morr. Trans., 541.

3. ASSAULT AND BATTERY—EVIDENCE OF PHYSICIAN—STATEMENTS OF PATIENT.

In an action for assault and battery the physician who attended the plaintiff may give his opinion that the plaintiff's symptoms were such as might have been expected to follow from a severe blow; but he can not testify to her statements that she "had received a blow in the stomach." *Roosa v. Boston Loan Co.*, S. Jud. Ct. Mass., March, 1882, 14 Rep. 242.

4. BONDS—WAIVER OF RIGHTS UNDER.

The acceptance by the creditors of their interest raised in a different mode than that prescribed in the contract is no waiver of their right to insist on the contract. *State ex rel. v. Pilsbury*, U. S. S. C., April 17, 1882, 4 Morr. Trans. 514.

5. COMMON CARRIERS — PASSENGER'S BAGGAGE — CONNECTING LINES.

1. Where a passenger with a through ticket over a connecting line of railroads, checks his baggage at the starting point through to his destination, and upon arrival, it is damaged or has been broken open and robbed, he may sue the railroad which issued the check, or he may sue the road delivering the baggage in bad order. 2. That under the American authorities each of the roads composing such a continuous line over which a passenger travels on a through ticket, and baggage is sent on a through check, is a principal contractor, adopting the contract of the first road, and is therefore liable for spoliation of baggage, irrespective of the point at which it actually occurred. *Wolff v. Central R. Co.*, S. C. Ga., 3 Ohio L. J., 43.

6. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS.

A funding act of a State authorizing the funding of its debt, but excluding from its provisions some bonds of doubtful validity until their validity was established by a decree of a court in a proceeding provided for that purpose, does not impair the obligation of those bonds, even though in that special proceeding proof of their invalidity is allowed as against a *bona fide* holder. *New York Guaranty Co. v. Board of Liquidation*, U. S. S. C., April 17, 1882, 4 Morr. Trans., 508.

7. CONSTITUTIONAL LAW —TAXATION OF BANK SHARES—NATIONAL BANKING ACT.

1. The act of 1866 of the New York legislature imposing a tax on bank shares, but not allowing the shareholder to deduct from his shares the amount of his debts, as was allowed the owner of all other personal property by the act of 1850, is to that extent, in so far as it applies to stockholders of national banks, in conflict with the national banking act, and unconstitutional. 2. It is not, however, absolutely void, but is void as against the act of Congress only in cases where some one was injured by the particular matter in conflict. Those portions of it which are valid are separable from those which are invalid. Even as regards national

bank stock, it is valid as to holders who owe no debts, and only voidable as to those who are indebted, and stands as against them until, by taking the steps required by the State law, they prove themselves entitled to the reduction. 3. Hence the case at bar was reversed and remanded, with permission to the inferior court in its discretion to allow amendments and to hear evidence tending to prove a practice of the tax assessors to assess national bank stock higher than other moneyed property. *Board of Supervisors v. Stanley*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 543.

8. CONSTITUTIONAL LAW—TITLES OF ACTS—GERMANE PROVISIONS.
An act "to consolidate the city of New Orleans, and to provide for the government and administration of its affairs," which provides for the funding of the municipal indebtedness, is not repugnant to the article of the State Constitution which requires every legislative act to embrace but one object, which shall be expressed in its title; for the requirement of the Constitution is satisfied if the different provisions of the act are all germane to the general subject indicated by the title. *State v. Pilsbury*, U. S. S. C., April 17, 1882, 4 Morr. Trans., 514.

9. CONTRACT—CONSTRUCTION—BILL OF EXCHANGE.
A bill of exchange headed "Office of Bellville Nail Mill Co.," and concluding "charging same to account of Bellville Nail Mill Co., A. B., Pres't, C. D., Sec'y," is the bill of the company, and not of the individual signers; and a declaration thereon against the latter as drawers, setting forth the instrument, and alleging it to be their bill of exchange, is bad on demurrer. *Hitchcock v. Buchman*, U. S. S. C., 4 Morr. Trans., 468.

10. CRIMINAL LAW—CONCEALED WEAPONS— SELF-PROTECTION.
Carrying a pistol concealed in violation of the statute (Acts 1879, ch. 127), is not excused, even for self-protection, by a communication of threats of violence made against the defendant. *State v. Speller*, S. C. N. C., 14 Rep., 249.

11. EASEMENT—OF NECESSITY— RESERVATION IMPLIED IN GRANT.
Where an easement is in the nature of an easement of necessity, there is no need of an express reservation of such easement in a conveyance of the property to be affected by the easement; and such reservation is a matter of legal presumption, to be implied from the nature of the transaction between the grantor and grantee. *Shubrook v. Tuffnell*, Eng. High Ct., Q. B. Div., 46 L. T. R. 886.

12. FEDERAL COURTS — APPELLATE JURISDICTION —BILLS OF EXCEPTIONS.
1. Although the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, yet its actual jurisdiction is limited to whatever particular classes of cases or modes of proceeding which Congress sees fit to prescribe; and the act of 1875, limiting, on appeals in admiralty, the power of review to questions of law arising on a finding of facts by the inferior court, is constitutional. 2. While exceptions may be taken to the failure of the inferior court to insert in its findings material evidence, or to its finding as a fact a thing which there is no evidence to prove, yet exceptions can not be taken to its failure to find mere incidental facts, only bearing on the ultimate fact, and not necessary to its determination. 3. Bills of exceptions should present only a separate and distnct points of law; and those which, under the guise of excepting to the failure to find certain facts, set out substantially the whole evidence, and in that way endeavor to procure a review of the decisions of fact by the lower court, can not be considered. *Duncan v. Steamer Francis Wright*, U. S. S. C., April 17, 1882, 4 Morr. Trans., 487.

13. FIXTURES—MARBLE COUNTER SLABS—WEATHER VANES.
Marble counter slabs in a store, where the counter is complete without them, and weather vanes attached to the roof of a house, are not parts of the realty, and hence do not pass to the sheriff's vendee of the land. *Harmony Building Association v. Berger*, S. C. Pa., 13 Pitts. Leg. J., 17.

14. GIFT—FROM WARD TO GUARDIAN—BURDEN OF PROOF—LAPSE OF TIME.
The gift from a ward to a guardian is voidable; and the burden of proof is on the donee to show that the transaction was fair; that it was freely, voluntarily and understandingly made; and that the donor had competent and disinterested as to the subject-matter of the gift. Mere lapse of time is no protection to the guardian; for, while it is proof of acquiescence and confirmation there can be no confirmation by the donor without a knowledge of the invalidity of the gift, and of his right to set it aside; and it is incumbent on the donee to establish such knowledge, not by guess-work, but by substantial facts proved; and, also, that the acquiescence was the free and intelligent choice of the donor, and not the product of the confidential relation. *Wade v. Pulsifer*, S. C. Vt., 3 Ohio L. J., 41.

15. HOMESTEAD—AS AGAINST JUDGMENT IN TORT.
The homestead exemption applies only to "debts contracted," anddoes not extend to judgments in actions grounded on torts. *Meredith v. Holmes*, S. C. Ala., 14 Rep., 237.

16. JURY TRIAL—CHALLENGE TO ARRAY—EXCLUSION OF A CLASS.
The only ground of challenge to the array at common law are partiality, fraud, or some irregular or corrupt conduct on the part of the returning officers. A defendant has no cause of complaint in the exclusion of a class of persons from the opportunity to become jurors, so long as the persons serving as jurors are legally qualified. *State v. Bradley*, S. C. Err. Conn., 14 Rep., 238.

17. LIEN—EQUITABLE CHARGE—FUNDS ADVANCED TO ASSIST IN THE MANUFACTURE OF GOODS.
An agreement between a tanner and a leather merchant, by which the latter is to make certain advances for the purpose of enabling the former to tan certain skins and ship them to the merchant, and in which the skins, etc., before shipping, are pledged to the merchant as security, creates an equitable charge, which is good as between the parties, even without recording or a change of possession, and hence is good against the tanner's assignee in bankruptcy, who succeeds only to his rights; and therefore a subsequent agreement, *bona fide* made between the tanner and the merchant just before the filing of the petition in bankruptcy by the former, and with knowledge of the bankruptcy, which puts the latter into possession in pursuance of the former agreement, is not a fraudulent preference under the bankrupt act. *Hansett v. Harrison*, U. S. S. C., April 10, 1882, 4 Morr. Trans., 470.

18. MARRIED WOMAN—SEPARATE ESTATE—POWER OF TRUSTEE TO CHARGE THE ESTATE.

A married woman grants an estate to a trustee upon trust for her sole and separate use, remainder to her children, and appoints her husband agent and co-trustee to manage the estate, providing that the trustee shall not be liable for his acts. The deed gives neither the trustee nor the husband a right to charge the trust estate for the expenses of running it. Parties who furnish supplies to the husband for the estate, alleging that they were used on the estate by the trustee after the husband's death, and that the trustee admitted a liability for them, and that the husband and trustee were both insolvent, and that the trustee would have had the right to charge the same against the estate in his accounts, attempt to enforce an equitable charge therefor against the estate: *Held*, that as neither the husband nor the trustee had the power to charge the estate, the creditors did not have any claim of subrogation nor any ground of enforcing against the estate the payment of their demand. *Hewitt v. Phelps*, U. S. S. C., April 10, 1882, 4 Morr. Trans., 455.

19. MASTER AND SERVANT—CONTRACT OF HIRING—PRESUMPTION.
A hiring at a salary of £500 a year is *prima facie*, and in the absence of any custom to the contrary, a hiring for a year certain. Plaintiff was employed as engineer to the defendants at a salary of £500 a year, and was dismissed at a three months' notice. *Held*, that the plaintiff was entitled to recover salary for unexpired portion of the year. *Buckingham v. Surrey and Hants Canal Co.*, Eng. High Ct., Q. B. Div., June 21, 1882, 46 L. T. R., 885.

20. MORTGAGE—PROCEEDINGS IN FORECLOSURE—JURISDICTION.
1. In a proceeding for an order of seizure and sale to foreclose a mortgage for the unpaid purchase-money of a plantation, in which the mortgagor appeals from the decision granting such order, a bond with security conditioned "that the appellant * * * * shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of sale of his estate; * * * * otherwise that the surety shall be bound in his stead," is a bond taken under articles 575 and 579 of the Louisiana Code of Practice; and the surety on such bond is liable for the debt whose enforcement is thus suspended, and not merely for damages from delay, costs and interest. 2. Where the subject-matter of the proceedings and the parties are before a court which is proceeding to foreclose a mortgage for default in the payment of some of the instalments, it has jurisdiction, even though at the time a suit is pending in another court on some former instalment; and its acts can not be collaterally attacked. 3. The satisfaction of a decree on an appeal bond given in one court to suspend the collection of one instalment of the unpaid purchase-money is no satisfaction of an appeal bond given in another court to suspend the collection of another instalment. 3. The foreclosure of a mortgage and application of the proceeds of sale to the payment *pro rata* of the instalments, to suspend the enforcement of which the appeal bond was given, is not such an act of the creditor as discharges the surety under section 3061 of the Louisiana Code of 1860. *Marchand v. Frellsen*, U. S. S. C., April 3, 1882, 4 Morr. Trans., 431.

21. MUNICIPAL BONDS—EVIDENCE THAT STATUTORY REQUIREMENTS WERE COMPLIED WITH.
A legislative act requires that certain bonds of a city must be authorized to be issued by a majority of the tax payers. By the charter of the city at the time of the election in question, only tax payers were qualified voters. The holder of the bonds in suit offered to prove this by the poll-books, which showed that a large majority of the votes cast was for authorizing the issue of the bonds, but did not show that the voters were tax payers: *Held*, that the plaintiff was not bound to prove this latter fact, but that it would be presumed that the officers conducting the election received the votes only of those properly qualified, and hence that only tax payers voted. *Hannibal v. Fauntleroy*, U. S. S. C., April 17, 1882, 4 Morr. Trans., 497.

22. PATENT—VOID FOR WANT OF NOVELTY.
Guidet's reissued patent No. 4106, dated August 23, 1870, claiming as his patent the use of stone blocks for paving in the form of parallelopipeds with rough side surfaces, but without saying how rough, is void, it being proved that blocks of that character had been in use before his patent, and his patent merely being an improvement in the amount of roughness to be used, and not being patentable. *Guidet v. Brooklyn*, U. S. S. C., April 17, 1882, 4 Morr. Trans., 511.

23. PRACTICE—DENIAL OF SIGNATURE TO INSTRUMENT.
A statute prohibiting defendants, in actions upon written instruments, from denying their signatures, except under plea verified by affidavit, does not apply to a case in which the defendants demur because the instrument declared on appears upon its face to be the contract of their principal and not of themselves. *Hitchcock v. Buchman*, U. S. S. C., April 10, 1882, 4 Morr. Trans., 468.

24. PUBLIC LANDS—EVIDENCE—PRESUMPTION IN FAVOR OF OWNERSHIP.
1. The inference in favor of any claim of right to public lands against the United States growing out of mere possession is of but little weight. 2. The absence both of a patent and of a certificate of entry renders very weak a claim to public lands established merely by the application on file in the land office and the entry of the terms of sale, etc., on the books of the land office. 3. A prior claim to a piece of public land patented *held* on the facts not to be substantiated, especially against a patentee with a patent accompanied by possession. *Simmons v. Ogle*, U. S. S. C., April 10, 1882, 4 Morr. Trans., 479.

25. REMOVAL OF CAUSE—AFTER DECREE IN STATE SUPREME COURT.
1. A suit in chancery instituted in a State court and a decree of dismissal entered previous to the removal act of March 3, 1875, in which there was an appeal to the State Supreme Court, which reversed the decree and remanded the cause with leave to parties to amend the pleadings and to take testimony and to take an account, is a pending suit within the meaning of that act, and may be removed to the appropriate Federal court. 2. After such a decree of the State Supreme Court, the decree was not final nor conclusive, and the cause stood for a rehearing on the merits and not for the purpose of merely executing the judgment of the appellate court, and, therefore, in the meaning of the removal acts, the removal was "before the trial thereof." *Hewit v. Phelps*, U. S. S. C., April 10, 1882, 4 Morr. Trans., 455.

26. REVENUE—IMPORT DUTIES—"THREAD LACE AND INSERTINGS."
Torchon laces are subject to the duty of thirty per

cent. imposed on "thread lace and insertings," and not to that of forty per cent. imposed on manufactures of flax, or of which flax is the component material of chief value "not otherwise provided for." *Henry v. Field*, U. S. S. C., March 20, 1882, 4 Morr. Trans., 317.

27. REVENUE LAW—USAGE IN THE INTERPRETATION OF.

It being entirely clear from the internal revenue laws that manufacturers of friction matches are entitled to a commission of ten per centum on the whole amount of stamps purchased by them, when furnishing their own dies, a uniform practice of the department to allow ten per centum in stamps at their face value, and only on the amount of money paid by purchasers, is not binding, unless it is proved to have been acquiesced in or agreed to; and a long-running account between the department and certain purchasers, treated by both not as an aggregation of separate items, but as a running account, is not sufficient proof of such acquiescence. *Swift, etc. Co. v. United States*, U. S. S. C., April 17, 1882, 4 Morr. Trans., 503.

28. TAXATION—UNIFORMITY AND EQUALITY.

Article 127 of the Louisiana Constitution of 1845, providing that "taxation shall be equal and uniform throughout the State," and that "no one species of property shall be taxed higher than another species of property of equal value on which taxes shall be levied," applies only to State and not to municipal taxation, and did not require that all property in the State should be taxed, but simply that all property which was taxed should be equally taxed. *State v. Pilsbury*, U. S. S. C., April 17, 1882, 4 Morr. Trans., 514.

CORRESPONDENCE.

INACCURACY OF REPORTS.

Editor Central Law Journal:

My attention has been called to the inaccuracies of the reports of cases by an examination of the 74 Missouri just issued. In the case of Alexander v. Relfe, page 495, an elaborately reported one, the *syllabus* states, as the law of the case, that "the Supreme Court will not reverse a judgment on the ground that the verdict is excessive, unless the point was made in the motion for new trial." This is a correct statement of point 5 of the opinion, where the court says (page 520): "But even if the damages adjudged by the circuit court were excessive, no such point was made in the motion for a new trial; no opportunity was given that court to correct the erroneous excess, if any there was, and it is too late to raise the point in this court for the first time. Sweet v. Maupin, 65 Mo. 68, and cases cited." On page 521 it is noted that a motion for rehearing was overruled. In this latter statement the inaccuracy consists.

While it is true that the motion for a rehearing was overruled, it was done on terms, and under these circumstances: Upon the rendition of the judgment reversing that of the Court of Appeals, a motion for rehearing was filed, assigning, among other grounds, the error of the court in holding that in an equitable action, where the whole record is before the court, it was necessary to save the point of the excessive amount of award by a specific allegation in the motion for rehearing or new trial. In the printed brief in support of this motion for rehearing in the Supreme Court, it was shown that Sweet v. Maupin 65 Mo. 68, was not in point, because that was an action at law, and was decided on the express ground that the defect was a mere formal one which had been waived.

In support of the position that the appeal, in equity cases, takes up the whole record, the cases of Knowles v. Mercer, 16 Mo. 457; State, *ex rel.* v. St. Louis Circuit Court, 41 Mo. 579; Banks v. McCarty, 5 Mo. 1; Holden v. Vaughan, 64 Mo. 588; 2 Daniel's Ch. Pr. (4th ed.) pp. 1484 and 1488; Edmonson v. Phillips, 73 Mo. 57; Real Estate S. I. v. Collonious, 63 Mo. 290, were cite and, in application to the case at bar, it was demonstrated by the record that the judgment was for at least $105,066.46 too much. This motion for rehearing was taken under advisement, and the court announced that it would be sustained as to the question of the excessive amount of the award. The appellant thereupon, in open court, remitted about $120,000 from the judgment, and the court then overruled the motion for a rehearing.

It will thus be seen that the report is misleading in merely saying that the motion for rehearing was overruled, for the action of the court was, in effect, to grant a rehearing on the question of excessive damages, and, when the excess was remitted, it then refused to reverse.

Its action showed that it receded from the position that in an equity case it was necessary to call attention to the excess of damages awarded by specific assignment of that error in the motion for a new trial, and held to precisely the opposite doctrine.

As neither Mr. Carr nor myself tried the case in the lower court, nor prepared the motion for new trial, I have nothing to say as to the form of that motion, nor do I wish to be understood as blaming our present reporter, Mr. Skinker, for think he is one of the best and most painstaking we have had. The fault of such misleading reports probably lies elsewhere. If such inaccuracies occur in an important case, how much reliance are we to place on those of minor importance, and where is the remedy?

St. Louis, Mo. GEO. D. REYNOLDS.

QUERIES AND ANSWERS.

[*,* *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases*

must, for want of space, be invariably rejected. Anonymous communications are not requested.

QUERIES.

26. Is there property in dogs under the laws of Missouri? Can a city council adopt an ordinance requiring the chief of police to "kill every dog he may find without a tag showing that the city tax has been paid?" Can property be destroyed, simply because the owner refuses or neglects to pay the taxes thereon? W.

27. A, the *bona fide* holder of B's promissory note, at its maturity demands payment from B. The latter gives A an order or draft for the required sum on C, a merchant in the same place. A thereupon surrenders the note to B, and presents the order or draft to C for payment. C takes this order or draft and gives to A his check on his bank in the same locality. The bank dishonors and refuses to pay the check. A tenders this check to C, demands surrender of the draft and is refused. What is A's remedy against B and against C, supposing that A gives B notice of C's conduct within a reasonable time? H. H.

28. A having an execution against B for $3,000, caused it to be levied on three separate parcels of real estate belonging to B, worth about that sum, and advertised the same for sale in one lot. B requested both A and the sheriff to sell the three parcels separately, which they refused to do, and the property was sold by the sheriff in one lot to A for $1,000. Shortly afterwards A resold the property for more than $3,000. B having died, a now sues his administrator for the balance of $2,000, which he claims to be still due on his execution. Can the administrator maintain a bill in equity to restrain the suit, claiming that A has been already paid out of the proceeds of the real estate, and that the three parcels would have brought enough at the sheriff's sale to satisfy the execution if they had been sold separately as requested? Cite authorities. H.

29. 1. Can an interpleader (under Missouri statute) in attachment suit, who has sustained his interplea, maintain an action for damages on the attachment bonds? 2. Can he recover attorney fees for the action on the interplea in such suit on the attachment bond? 3. Can interpleader claim his damages in his interplea, and have the same assessed in that trial?
Rich Hill, Mo. M. L. B.

30. A, a citizen of Alabama, and B, a citizen of Virginia, entered into a contract by which the former agreed to deliver to the latter, by a given date, a certain amount of Confederate States bonds at four dollars per thousand. At the time and place agreed on for delivery Confederate bonds were selling at ten dollars per thousand. There was a failure on the part of A to deliver. The agreement and breach occurred in 1881. Will an action lie in a Federal or State court for the breach of such a contract? T.
Montgomery, Ala.

RECENT LEGAL LITERATURE.

MISSOURI REPORTS. Reports of Cases Argued and Determined in the Supreme Court of the State of Missouri. Thomas K. Skinker, Reporter. Vols. 73 and 74. Kansas City, 1882: Ramsey, Millett & Hudson.

These two volumes include part of the decisions of the Missouri Supreme Court rendered at the October Term, 1880, those rendered at the April Term, 1881, and a part of those rendered at the October term, 1881. The cases are well and carefully reported, and the mechanical execution of the volumes is excellent. We have spoken elsewhere in this issue of some of the particulars, in respect to which, grave imperfections are to be found in these volumes.

AMERICAN DECISIONS. The American Decisions, Containing the Cases of General Value and Authority Decided in the Courts of the Several States from the Earliest Issue of the State Reports to the year 1869. Compiled and Annotated by A. C. Freeman. Vols. 33, 34, 35 and 36. San Francisco, 1882: A. L. Bancroft & Co.

These volumes of this most excellent series cover the period between the years 1838 and 1841, inclusive. The cases selected for reporting in these volumes are, as they have been throughout the series, really leading cases, and the notes are condensed and thorough and, above all, are upon topics of live practical interest, among which are: "What is Gaming;" "Liability of Infants for their Torts;" "When is Probate of Will, or Letters of Administration, Void for want of Jurisdiction;" "Alluvion;" "Power of the Judiciary to Issue Mandamus against the Governor;" "Right of Vendor to Reclaim Goods Fraudulently Purchased," and "Necessity of a Levy to Sustain a Sale," in volume 33; "Attorney's Liability for Negligence and Want of Skill;" "Amendments Varying or Altering a Cause of Action;" "Liability of Bank as Collecting Agent;" "By-Laws and Municipal Ordinances," and "Judgments against Trustee, to bind *Cestuis que Trust*" in volume 34; "Master's Liability for Servant's Torts;" "Misconduct of Jurors, as Ground for New Trial;" "Regulation of the Sale of Intoxicating Liquors by the State;" "Ancillary Administration" and "Interpleader in Equity," in volume 35; and "Employer's Liability for Injuries to Servant through the Negligence of his Fellow Servant," and "Unexecuted Will, How far Valid," in volume 36.

NOTES.

——Lord Wellesley's aid-de-camp, Keppel, wrote a book of travels and called it his Personal Narrative. Lord Wellesley was quizzing it, and said to Lord Plunkett: "Personal narrative—what is a personal narrative, Lord Plunkett? What should you say a personal narrative meant?" Plunket answered: "My Lord, you know we lawyers always understand *personal* as contradistinguished from *real*."—*James' Curiosities of Law and Lawyers.*